Hearing Date: November 18, 2004
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ITEM ___
TEST CLAIM
DRAFT STAFF ANALYSIS

Labor Code Section 3212.11

Statutes 2001, Chapter 846 (AB 663)

Skin Cancer Presumption for Lifeguards (01-TC-27)

City of Newport Beach, Claimant

EXECUTIVE SUMMARY

The Executive Summary will be included with the Final Staff Analysis.

STAFF ANALYSIS

Claimant

City of Newport Beach

Chronology

07/01/02	Commission receives test claim filing
07/08/02	Commission staff determines test claim is complete and requests comments
08/06/02	Department of Finance files response to test claim
08/30/02	Claimant files statement responding to Department of Finance comments

Background

This test claim addresses an evidentiary presumption given to state and local lifeguards in workers' compensation cases. Normally, before an employer is liable for payment of workers' compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is usually on the employee to show proximate cause by a preponderance of the evidence.[1]

The Legislature eased the burden of proving industrial causation for certain public employees, primarily fire and safety personnel, by establishing a series of presumptions.[2] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption …, the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

In 2001, the Legislature passed Assembly Bill 663, adding section 3212.11 to the Labor Code. For the first time, publicly-employed lifeguards were granted a rebuttable presumption that skin cancer developing or manifesting during or for a defined period immediately following employment "shall be presumed to arise out of and in the course of employment." Under the statute, the employer may offer evidence disputing the presumption.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts the following:

> [The test claim legislation] creates a new injury heretofore not compensable and provides a presumption that shifts the burden of proof to the employer.

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[1] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[2] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

> The effect of a presumption is that the employee does not have to demonstrate that the illness arose out of and in the course of his or her employment. The first effect of a presumption is to encourage the filing of workers' compensation claims because of the fact that otherwise it would be often difficult, if not impossible, to demonstrate that a particular illness arose out of and in the course of one's employment. The presumption … works to the detriment of the employer who must now prove that the illness did not arise out of or in the course of the employee's employment, which is difficult. … With this legislation, however, the defense that the employee had skin cancer prior to employment has been eliminated.[3]

The claimant further argues that the "net effect of this legislation is to cause an increase in workers' compensation claims for skin cancer and decrease the possibility that any defenses can be raised by the employer to defeat the claims. Thus, the total costs of these claims, from initial presentation to ultimate resolution are reimbursable."[4]

State Agency's Position

The Department of Finance filed comments on August 8, 2002, concluding that the test claim legislation may create a reimbursable state-mandated program.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[5] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[6] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[7] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

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[3] Test Claim, page 2.

[4] *Ibid*.

[5] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[6] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[7] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

task.[8] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[9]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[10] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[11] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[12]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[13]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[14] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[15]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Staff finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6.

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[8] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[9] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[10] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[11] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[12] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[13] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[14] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[15] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Labor Code section 3212.11, as added by Statutes 2001, chapter 846, provides:

> This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term "injury," as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.
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> Skin cancer so developing or manifesting itself shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board shall find in accordance with it. This presumption shall be extended to a lifeguard following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.
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> Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.
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> This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

> There was no requirement prior to 1975, nor in any of the intervening years, until the passage of [the test claim legislation in 2001] which mandated the inclusion of skin cancer as a compensable injury for lifeguards, the creation of a presumption in favor of skin cancer on the job, and the elimination of the pre-existing condition defense for employers.[16]

The claimant reads requirements into Labor Code section 3212.11, which, by the plain meaning of the statute, are not there. First, the claimant asserts in the test claim filing that the legislation created a new compensable injury for lifeguards. However, Labor Code section 3208, as last amended in 1971, specifies that for the purposes of workers' compensation, "Injury' includes *any* injury or disease arising out of the employment." [Emphasis added.] Assembly Bill 663's sponsor, the California Independent Public Employees Legislative Counsel, stated that since 1985, one-third of the 30 City of San Diego lifeguards who received industrial disability did so due to skin cancer.[17] Thus, public lifeguards' ability to make a successful workers' compensation claim for an on-the-job injury from skin cancer predates the 2001 enactment of Labor Code section 3212.11.

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[16] Test Claim, page 2.

[17] Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of Assembly Bill No. 663 (2001-2002 Reg. Sess.), page 4, September 7, 2001.

The express language of Labor Code section 3212.11 does not impose any other state-mandated requirements on local agencies. Rather, the decision to dispute this type of workers' compensation claim and prove that the injury is non-industrial remains entirely with the local agency. The plain language of Labor Code section 3212.11 states that the "presumption is disputable and *may* be controverted by other evidence ..." [Emphasis added.]

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][18]

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[19] Consistent with this principle, the courts have strictly construed the meaning and effects of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[20]

This is further supported by the California Supreme Court's decision in *Kern High School Dist.*[21] In *Kern High School Dist.*, the court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[22] The ballot summary by the Legislative

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[18] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[19] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[20] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

[21] *Kern High School Dist., supra*, 30 Cal.4th 727.

[22] *Id.* at page 737.

Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders." [23]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.[24] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[25]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][26]

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[27]

The decision of the California Supreme Court in *Kern High School Dist.* is relevant and its reasoning applies in this case. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[28] Thus, based on the Supreme Court's decision, the Commission must determine if the underlying program (in this case, the decision to rebut the presumption that the cancer is an industrial injury) is a voluntary decision at the local level or is legally compelled by the state. As indicated above, local agencies are not legally compelled by state law to dispute a workers' compensation case. The decision to litigate such cases is made at the local level and is within the discretion of the local agency. Thus, the employer's burden to prove that the skin cancer is not arising out of and in the course of employment is also not state-mandated.

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[23] *Ibid*.

[24] *Id.* at page 743.

[25] *Ibid.*

[26] *Id.* at page 731.

[27] *Ibid.*

[28] *Id*. at page 743.

Further, there is no evidence in the law or in the record that local agencies are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that local agencies will incur increased costs from workers' compensation claims as a result of the test claim legislation, as alleged by the claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[29]

Most recently in *San Diego Unified School Dist., supra,* 33 Cal.4th at pages 876-877, the Court held:

> Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra*, 50 cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

Prior Test Claim Decisions on Cancer Presumptions

Finally, the claimant points to two prior test claim decisions approving reimbursement in cancer presumption workers' compensation cases. In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers' compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.

However, prior Board of Control and Commission decisions are not controlling in this case.

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[29] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th at page 735.

Since 1953, the California the California Supreme Court has held that the failure of a quasi-judicial agency to consider prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency.[30] In *Weiss v. State Board of Equalization*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated, in pertinent part, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [31]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[32] While opinions of the Attorney General are not binding, they are entitled to great weight.[33]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 are not arbitrary or unreasonable as long as the decision strictly construes the Constitution and the statutory language of the test claim statute, and does not apply section 6 as an equitable remedy.[34] The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow. In addition, the Commission followed this same analysis in its most recent decisions regarding the issue of reimbursement for cancer presumption statutes.[35]

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[30] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777.

[31] *Id*. at page 776.

[32] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

[33] *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 227.

[34] *City of San Jose, supra,* 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280-1281.

[35] Test claim *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19) was denied at the May 27, 2004 Commission hearing, and *Cancer Presumption (K-14)* (02-TC-15) was denied at the July 29, 2004 Commission hearing.

Accordingly, staff finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on local agencies.

CONCLUSION

Staff concludes that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies.